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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of KAREN and
LAWRENCE REZNICK.

KAREN D. MERRITT (REZNICK),

Respondent,

v.

LAWRENCE S. REZNICK,

Appellant.

C044775

(Sup.Ct.No. 96FL06835)

This is a spousal support case. Husband appeals from the trial court's order after trial on Wife's order to show cause (OSC) seeking an increase of spousal support from "zero" to "reasonable," "guideline" support. Husband contests the sufficiency of the evidence and the procedures employed.

The trial court interpreted Wife's OSC, in effect, to be a motion to lift a temporary stay of a prior order, and refused to adjudicate husband's request to determine whether any spousal support should be awarded. Family Code section 213 (§ 213) requires the trial court to consider issues raised in a response which present alternatives to the relief sought by the OSC, provided the alternatives relate to the same issues. We conclude Husband's response related to the same issues. We reverse with directions to vacate the order and reopen the proceedings to consider the issues raised in husband's response.

FACTUAL AND PROCEDURAL BACKGROUND

Spousal Support of \$775

After a settlement conference in December 1998, the parties entered into a stipulated judgment of dissolution. The marriage had lasted for over 18 years and produced children. Husband was to pay Wife spousal support of \$775 per month beginning January 1, 1999. The judgment recites that Wife "has been given a *Gavron* warning and shall make good faith effort to secure [full time] employment." Such an admonishment warns a recipient of spousal support that failure to attempt to become self-sufficient may result in termination of support. (See *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 711-713.) The judgment was not entered until December 14, 1999.

Reduction to \$557

On August 7, 2000, Husband filed a motion to modify custody, visitation and support. Husband declared that despite Gavron warnings and a vocational evaluation paid for by Husband, Wife had done nothing to improve her financial situation, therefore spousal support should be terminated or at least reduced based on her earning capacity.

Wife opposed the motion, claiming that she worked two part-time jobs (as an insurance broker and a customer service representative) and was diligently seeking full time work with the State of California. She had an average monthly income of \$1,160 over the past year.

Husband's reply questioned her diligence because "income has not risen significantly in six years and does not represent the income of an active insurance salesperson interested in earning a living from this profession."

On November 29, 2000, Judge Gilliard approved a stipulation setting monthly income at \$8,714 for Husband and \$2,506 for Wife, for the purpose of calculating child and spousal support. Beginning November 1, 2000, monthly spousal support was set at \$557. Later, in January 2001, the court ordered Husband to pay Wife \$1,000 in attorney fees, and ordered Wife to appear monthly "on the 'Seek Work' calendar . . . and provide evidence to the Court of good faith efforts to secure full-time, better (more

lucrative) employment," and Husband "shall be permitted" to seek review of spousal support after one year.

Reduction to \$0

On April 18, 2001, before the one-year review period, Husband moved to modify spousal support to "zero" because his contract as a computer consultant had not been renewed and therefore he lost his job at the end of March.

Wife's counter declaration claimed Husband knew his contract was expiring, did not take steps to prepare, and failed to seek unemployment benefits. She alleged Husband's new spouse was well off "and he isn't really going to suffer." She opined that his latest income declaration was "outrageous if he does not have a job," pointing to certain arguably exorbitant expense claims. She requested that "support be reinstated automatically" when he found a job "or that any order be retroactive to the first day of employment."

In May 2001 Judge Gilliard reduced support to zero as of April 18, 2001, based on Husband's unemployment wages of \$997 and Wife's wages of \$2,577. A formal order was issued on June 13, 2001. The order states an overpayment "shall be deducted against future spousal support payments once they resume," provides a mechanism to monitor Husband's job search, and states that when he finds a job "he will provide employment contract

showing pay information immediately . . . for the purpose of calculating support."

This order does *not* provide for "automatic" reinstatement of the prior support amount, as Wife requested. That is, it was not framed as a "step up" order in which an effective stay of the prior order would be lifted on the happening of a trigger event, such as, the Husband's success at finding a job. (Cf. Garbolino & Grilli, Cal. Family Law Bench Manual (3d ed. 2003) Spousal Support, § 6.2.4.3, p. 130.) The order contemplated future spousal support would have to be set based on Husband's new income, because it refers to the need to "*calculat[e]*" support, not simply reinstate a prior level of support.

The OSC

On April 30, 2002, Wife filed an OSC to increase spousal support, alleging Husband was now employed, and his spouse was well off. Wife now worked for the State of California.

The Judicial Council OSC form submitted by wife has boxes checked for "Child Support," "Spousal Support" and "Attorney Fees and Costs." It also has the box checked to "Modify existing order", specifying an order date of "5/14/01," which is actually the date of the hearing after Husband became unemployed, and for "Amount requested (monthly)" Wife wrote "Reasonable." The declaration of facts in support of the OSC partly alleges "On 5/14/01 all of my child support and spousal

support **were dropped to zero** as [Husband] lost his job and went on unemployment. This was a great hardship for my son and I [sic]. (**[Husband's] new wife makes over \$5,000.00 per month, so he suffered no hardships.**) [¶] [Husband] has secured new employment and *I am now requesting that my support be reinstated according to guideline support.*" (Bold in original, italics added.) She alleged her attorney had delayed filing the OSC based on a letter from opposing counsel which she construed as an agreement that support would date back to September 1, 2001.

Thus, Wife's motion sought "reasonable" support as stated on the form, and in her declaration, she wanted "guideline support." "Guideline" is a term of art in family law, referring to a chart or formula used by courts to calculate a default figure, which may be adjusted for special circumstances. (See Practice Under the California Fam. Code (Cont.Ed.Bar 2003) Spousal Support, § 6.4, pp. 158-159.)

Wife did *not* frame her OSC as one seeking reinstatement of a prior support order. Instead, she sought to adjudicate the true nature of Husband's income, which was debatable because his employment contract provided that half his pay would be in company "granted stock valued at our current-round pricing." According to Wife, "beginning January 21, 2002, it was all paid in cash," and he was then making \$8,333 per month. Husband claimed the stock was worthless.

The Response

Husband's response to the OSC sought permanent termination of spousal support "or to remain at zero." He claimed the stock was worthless, but beginning January 21, 2002, the company began paying his full salary in cash. He alleged Wife earned \$2,764 per month working full time for the State, that she was making \$600 to \$650 per month in overtime, and that she was a spendthrift who only needed more money because she had run up consumer debt after marriage. Husband's attorney disagreed with Wife's interpretation of the letter regarding retroactivity of support.

After a hearing, Judge McBrien signed an order filed August 1, 2002, ruling "Father is estopped to argue against child support starting September 1, 2001," and ordering Husband to pay Wife \$500 for fees. The stipulated child support order was based on monthly income of \$8,333 for Husband and \$3,015 for Wife. The issue of spousal support was "set for the long cause calendar."

A settlement conference was set for May 13, 2003 (further dates are to 2003), and trial was set for May 22.

Both parties filed statements of controverted issues. Wife argued the "zero" support "stipulation was that when he returned to work the child and spousal support would start again." Husband outlined factors relevant to reconsidering spousal

support (see Fam. Code, § 4320) such as marketable skills, earning capacity and marital standard of living. On May 13, Husband filed a declaration stating his company was in trouble and he was receiving a \$2000 monthly stipend "towards my backpay."

Trial on the OSC

At the beginning of trial the parties and Judge Hersher discussed the scope of the issues to be decided. She had understood the matter was on for an hour and a half to a two-hour hearing on spousal support, and Wife's counsel agreed. Wife took the position that the original issues about spousal support should not be relitigated because "the only reason it had to stop, and we stipulated [to a reduction to zero], [was] because he was out of work. [¶] In the blue stip form we agreed that as soon as he became employed, they would notify us of his income so that we would know what it was to set support. But when that time came, they claim that they were not going to agree to reinstate spousal support, only child support."

Husband's position was that before he could calendar the review hearing following Judge Gilliard's order on his motion to terminate, he lost his job. Therefore, in his view, he was still entitled to litigate his motion to terminate. In particular, the marital standard of living, a key factor in setting support, remained to be litigated.

On hearing this, Judge Hersher said: "So your argument is basically all of these orders have been pendente lite . . . and you're seeking a hearing on the 4320 factors in an hour and a half today; is that what you're telling me?" After Husband's counsel essentially answered yes, the court stated there was a judgment and the only issue calendared was "whether or not there's any reason to modify the judgment or anything that has happened post the judgment in this interim period of time", including Wife's efforts to find work.

Wife's counsel pointed to the May 2001 order, which referred to a time when future spousal support resumes, arguing that meant the prior support order would spring into effect once Husband was reemployed. After an off-the-record discussion, the court ascertained that Husband's latest request to terminate was in his response to Wife's OSC.

After further discussion, the court recessed to handle other matters and proposed to trail the matter to the afternoon. The court then said "[i]f there's going to be an issue with respect to termination completely of spousal support, given the length of marriage, I think you're going to have to set that for separate trial and be prepared to go into the whole issue, all the issues on the 4320 factors and modification, termination at that point, but we're not going to do that today."

By means of an offer of proof by counsel, Wife testified to the history of the litigation, but when she discussed her current debts, the court interrupted and said in part "what I said already is there's an order for spousal support of 700 and something dollars per month, and the issue is whether or not it's going to resume now. I'm not doing a [interruption by counsel] modification of -- of spousal support." Wife continued (through counsel) that she has worked for the State since October 16, 2000, and earns \$3,300 per month, gross, with overtime. She requested \$5,000 for fees.

The court later reiterated that it was not going to decide support "other than reviewing back the orders where he went to zero because he was unemployed, and whether or not she made good faith employment efforts," and "if anybody wants to modify the post-judgment support amount based on anything other than loss of employment, they need to set that for trial -- for modification. This is a 19-year marriage."

When the court invited Husband's counsel to cross-examine Wife, counsel elected instead to put Husband on the stand. He claimed he was only paid \$2,000 per month. He testified Wife was now making more money than when the original support order was reduced to \$557. The stock he earned at his new company was worthless.

Under examination by the court, Husband conceded the stock deal was negotiated: "Q. In exchange for reduction in salary? A. That's correct." However, he testified the company would not have hired him had he insisted on an all-cash salary. On cross-examination he testified that after the company stopped paying all cash and gave him the \$2,000 monthly stipend, it also stopped giving him stock options. He admitted the "back pay" towards which the stipend might someday be applied was still at about \$100,000 per year. When he really was making that money, he did not put any aside to pay for spousal support. He has not looked for any other jobs, despite having only about \$2-3000 in savings, and over \$7,000 in monthly expenses.

After once again admonishing counsel about the scope of the hearing, the court recessed for lunch.

After Wife's counsel gave her closing argument, Husband's counsel requested a statement of decision, and the court agreed to give one. The court gave it orally as follows: Husband negotiated for the "abeyance" of income, which he might well realize someday, and he could instead have looked for another job. He set aside no money for spousal support, "under the impression that because he had sought to reduce spousal support to zero that that would automatically be granted by the court, even though this was an 18-plus-year marriage, and there was a judgment in the file and an order after hearing which was only a

temporary reduction to the amount based on his unemployment. It was not based on anything that I can see in the file, a determination by the court that his spousal support was going to be zero, particularly given the length of this marriage." The court referred to the short period of time in which Husband reduced support to zero and then took a high-paying job "and made no efforts whatsoever to come back into court to advise the court that he, in fact, had had his income dramatically increased. [¶] I don't find this to be particularly good faith on behalf of the respondent under the circumstances, and nor do I find the interpretation of the court's orders to be consistent with what happened over the period of time." The court ordered resumption of the \$557 spousal support order back to October 1, 2001. The court found Wife "satisfied her job search efforts. This order is without prejudice to the [Husband] to file an appropriate motion and order seeking a trial with all the 4320 findings with respect to termination of spousal support. But in order to do that, he is going to have to present a full evidentiary hearing on the requirements in order for him to do so." After observing that Husband had spent over \$16,000 fighting spousal support, and Wife sought \$5,000, the court awarded Wife \$3,000, and the parties then worked out a payment arrangement.

After the May 22 trial on Wife's OSC (filed over a year before), the court signed an order, filed on August 12, beginning: "After reviewing [the case file], the Court believes it can hear three matters: 1) Whether spousal support should resume based on December 11, 1999 order of \$775.00 per month, subsequently changed as permanent spousal support to \$557.00 per month, and subsequent temporary reduction to zero; 2) Whether Wife made good faith employment efforts as ordered on January 3, 2001; 3) Attorney fees related to trial today." The order observes that there was evidence Husband negotiated "his current salary/stock options/retroactive pay" and that before trial, while he "earned \$100,000.00 per year, [Husband] did not set aside funds to resume spousal support" and he did not look for other work since his monthly salary was dropped to \$2000. The court set spousal support back to \$557, retroactive to October 1, 2001, finding "the temporary modification [i.e., to zero] was never intended to be a basis for termination of support." Wife found "appropriate employment" and the court awarded her fees of \$3,000. "The above is resumption of spousal support after [Husband] becomes re-employed and is without prejudice to Respondent filing an appropriate motion and court conducting a hearing on termination of long term marriage spousal support after judgment entered in 1999 on 18+ year marriage."

Despite some confusion in the record, Wife concedes Husband filed a timely notice of appeal.

DISCUSSION

I. Evidentiary Contentions

Husband raises several evidentiary issues which appear either to disregard the appropriate standard of review or to consist of immaterial quibbles, or both. In light of our resolution, it would be premature to adjudicate these contentions, which may be mooted by the retrial.

II. Procedural Contentions

Husband argues the trial court improperly cabined the scope of the long cause hearing by refusing to allow him to present evidence on the section 4320 factors and determine if spousal support should be terminated. As shown above, the trial court ruled that Husband had to notice a motion for such a hearing, and all she needed to decide was whether the prior support order should spring into effect, and the effective date.

Section 213 partly provides: "(a) In a hearing on an order to show cause, or on a modification thereof, or in a hearing on a motion . . . the responding party may seek affirmative relief alternative to that requested by the moving party, on the same issues raised by the moving party, by filing a responsive declaration within the time set by statute or rules of court."

Section 213 applies in a "proceeding for dissolution of marriage," and Wife does not dispute that spousal support is part of a dissolution proceeding. Indeed, Wife does not even cite or discuss section 213.

Husband reasons that since Wife's OSC sought "reasonable" spousal support and not reinstatement of a prior order, his request to terminate spousal support or keep it at zero was embraced by that global issue and simply presented alternatives, as contemplated by section 213. Wife reasons that her OSC was simply directed at showing Husband *had a job* and therefore the prior order, which in effect had been stayed, should go back into force, therefore the issue she raised was not really entitlement to support, but whether Husband had a job. In her brief she goes so far as to refer to her "request to reinstate spousal support[.]" The record supports Husband.

As stated above, the OSC was clear: The form sought to "Modify existing order" to a "reasonable" amount. It did not seek to "reinstate" a prior order or lift the effect of a temporary reduction order. The attached declaration of facts states "Respondent has secured new employment and I am now requesting that my support be reinstated *according to guideline support.*" (Italics added.) There would be no need to refer to guideline support if all that was being sought was the lifting of a temporary reduction. And, as stated above, the "zero"

reduction itself was not styled as a temporary reduction, or one subject to automatic reinstatement: Wife had asked for automatic reinstatement, but the order did not grant her that right. It is true the "zero" order assumed at some point support would "resume" but it does not state an amount, which quite obviously would depend in large measure on Husband's future earnings, which were then unknown; indeed, it explicitly provides a mechanism to notify Wife when a job was secured "for the purpose of calculating support."

It is clear the trial court did not allow Husband to litigate the issue of "guideline support," including the need for any spousal support, as he emphatically sought to do.

In *Brody v. Kroll* (1996) 45 Cal.App.4th 1732, a mother with primary physical custody filed an OSC to move with the child to Connecticut. The father, in his response, checked the box to indicate custody was at issue. At the hearing, the trial court refused to consider a change of custody because the father had failed to file his own OSC. The court then modified visitation so as to enable the mother to move out of state. After quoting section 213, the court held: "The pending move clearly constituted a change of circumstances sufficient to allow the court to consider a change in custody. Father's responsive petition demonstrated his desire to take primary physical custody of Michael. We therefore hold that the change in

circumstances, together with father's response placed the issue of custody before the court." (P. 1736.)

A leading treatise gives the following example of what is the "same issue[]" under section 213: "A request for temporary spousal support may be met by respondent's outright consent, objection or alternative order for the moving party's benefit. An objection may also be accompanied by a request for temporary support for *respondent's benefit* (Fam. C. § 213)." (Hogoboom and King, California Practice Guide: Family Law (The Rutter Group 2003) ¶ 5:376, p. 5-136.) This example accords with Husband's view, that Wife's request for "reasonable" and "guideline" support opened the door for him to propose alternatives. The matter must be remanded to allow a Husband his day in court on issues which could undermine Wife's requested relief.

We emphasize that Husband may well lose on retrial, but he is entitled to litigate the issues he raised.

We are also aware proceedings have taken place since the notice of appeal was filed, but we have no basis to consider the effect of those proceedings in this decision. (See *Reznick v. Superior Court*, C044569 [writ discharged 9/17/03].) Neither party has suggested the appeal has been mooted by subsequent hearings.

III. Other Issues

Husband's brief raises issues about the amount of support, retroactivity and attorney fees. In light of our disposition, resolving these points now would be premature adjudication.

DISPOSITION

The order from which the appeal was taken is reversed with the directions to the trial court to reopen the trial in conformity with this opinion. Wife shall pay Husband's costs for this appeal.

_____, MORRISON, J.

We concur:

_____, RAYE, Acting P.J.

_____, HULL, J.